No. 545

Supreme Court of the United States

OCTOBER TERM, 1965

JOSEPH E. SEAGRAM & SONS, INC., *et al.*,
Appellants,

v.

DONALD S. HOSTETTER, Chairman, JOHN C. HART, WALTER C. SCHMIDT, BENJAMIN H. BALCOM, ROBERT E. DOYLE, constituting the State Liquor Authority, and LOUIS J. LEFKOWITZ, Attorney General of the State of New York,
Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR APPELLANTS

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Opinions Below

The opinion of the Court of Appeals of the State of New York and the opinion of the three dissenting judges (R. 342) are reported in 16 N. Y. 2d 47, 209 N. E. 2d 85, 262 N. Y. S. 2d 453 (1965). The opinion of the New York Supreme Court, Appellate Division, Third Department (R. 337), is reported in 23 A. D. 2d 933, 259 N. Y. S. 2d 644 (1965). The opinion of the New York Supreme Court, Special Term, Albany County (R. 320), is reported in 45 Misc. 2d 956, 258 N. Y. S. 2d 442 (1965).

Jurisdiction

The order of remittitur of the Court of Appeals for the State of New York (R. 355) was entered July 9, 1965. The notice of appeal to the Supreme Court of the United States (R. 359) was filed on July 23, 1965. Enforcement of the entirety of Section 9 and parts of Section 7 of Chapter 531, 1964 New York Session Laws was stayed by Chief Judge Charles Desmond, pending application for a stay to this Court. On August 5, 1965, Mr. Justice Harlan granted appellants' application for a stay, pending the determination of an appeal to this Court. Appellants' Jurisdictional Statement was filed on September 8, 1965. Probable jurisdiction was noted on November 22, 1965. The Jurisdiction of this Court is invoked under 28 U. S. C. § 1257(2).

Constitutional and Statutory Provisions Involved

For some time manufacturers and wholesalers of distilled spirits have been required pursuant to statute to file a schedule of prices at which they will sell in New York during the immediately succeeding month with the State Liquor Authority. This practice is not challenged here. At issue in this action is the constitutionality of the entirety of Section 9 and parts of Section 7 of Chapter 531, 1964 New York Session Laws.[1]

Section 9 provides that the price schedules of all distillers and certain "related person" wholesalers selling in New York must be accompanied by a duly verified affirmation attesting that the schedule contains prices no higher than the lowest charged by these distillers or by independent "related person" wholesalers elsewhere in the United

[1] Section 9 of Chapter 531, 1964 New York Session Laws, is also hereinafter cited as "Section 9 of Ch. 531" and "Section 9."

States during the immediately preceding month. Failure to file the affirmation will prevent both distillers and wholesalers from selling the brand in question in New York for at least a month. Filing a false affirmation, even innocently, can result in license revocation, penal sentences and severe fines to the erring distiller.

In order to understand the rationale of this maximum pricing legislation, it is necessary to examine Section 8 of Chapter 531, which states the legislative purpose underlying Section 9. The text of Chapter 531, 1964 New York Session Laws, with the challenged sections appropriately indicated, is set forth in Appendix A. A discussion of the effect of Section 9 is found *infra*, pp. 9-13.

Section 7 of Chapter 531, 1964 New York Session Laws, has added new conditions to the basic price filing requirements. Section 7 of Chapter 531 now prohibits a New York wholesaler from purchasing distilled spirits from a manufacturer unless that manufacturer has filed a schedule with the State Liquor Authority listing the prices at which the manufacturer sold to wholesalers "irrespective of the place of sale or delivery" of such liquor. Similarly, retailers may not purchase from wholesalers unless the wholesaler has filed such a schedule. Furthermore, the price schedules relating to distiller to wholesaler and wholesaler to retailer sales must now include "the net bottle and case price paid by the seller."

The constitutional provisions and federal statutes involved are also set forth in Appendix A at pp. A-1 through A-4.

Questions Presented

1. Does the Twenty-first Amendment to the Constitution of the United States permit the New York State Legis-

lature to enact laws which levy their primary economic burden on the operations of the alcoholic beverage industry in other states and which were not enacted to regulate any social problems arising from the use of these beverages?

2. Does Section 9 of Ch. 531, in conflict with the terms and policies of the Robinson-Patman and Sherman Acts, violate Article 6 of the Constitution of the United States?

3. Does Section 9 of Ch. 531, by requiring appellants to price in New York in accordance with a standard based upon their lowest prices elsewhere in the nation and upon the lowest prices charged by independent wholesalers in other states, violate Article 1, Section 8 of the Constitution of the United States?

4. Does Section 9 of Ch. 531, having no relation to a legitimate police power aim, violate the due process clause of the Fourteenth Amendment to the Constitution of the United States?

5. Does Section 9 of Ch. 531, which limits the maximum price New York "related person" wholesalers may charge for alcoholic beverages to the lowest price a wholesaler in any other state charged during the immediately preceding month while permitting other New York wholesalers to charge any price they choose, violate the equal protection clause of the Fourteenth Amendment to the Constitution of the United States?

6. Do certain parts of Section 7 of Ch. 531 also violate these constitutional guarantees?

Statement

Appellants shall describe the parties to this action and shall attempt to present a concise summary of relevant

sections of the New York State Alcoholic Beverage Control Law (hereinafter cited as the "ABC Law") prior to passage of the challenged sections. Only by an examination of the philosophy underlying the entire ABC Law and the reasons for the passage of Section 9 of Chapter 531, 1964 New York Session Laws, can a true understanding of the impact of Section 9 be attained.

A. The Parties.

Appellants are distillers (manufacturers), wholesalers and importers of branded distilled spirits.

Appellant-distillers sell their products, where permitted, throughout the United States and in many foreign countries. They include the great majority of the producers of distilled liquor who sell to wholesalers and, in some cases, retailers in New York. In addition certain distillers are United States importers and distributors for distilled spirits produced in foreign countries. Distillers who are qualified to do business in New York generally possess either a distiller's or a wholesaler's license as described in Section 61 and 62 of the ABC Law. Those not qualified to do business in New York sell to duly licensed wholesalers, some of whom act as agents for distillers in filing distiller-to-wholesaler price schedules as required by Section 101-b-3(a) of the ABC Law. Those distillers possessing licenses generally file their own price schedules.

Appellant-wholesalers conduct a large amount of the annual dollar volume of wholesale distilled spirits sales in New York. While the majority of these wholesalers are independent New York concerns, others are nationwide parent companies which own wholesale liquor outlets in New York and several other states. Every appellant-wholesaler possesses a New York wholesaler's license.

Appellant-importers purchase distilled spirits from foreign manufacturers and sell to wholesalers and retailers throughout the United States and in New York under authority of New York wholesaler's licenses.

Appellees are Donald S. Hostetter *et al.,* Chairman, and members of the State Liquor Authority, the body charged with administering the ABC Law and empowered to revoke distillers' and wholesalers' licenses for violations thereof and the Attorney General of the State of New York, Louis J. Lefkowitz, whose office is authorized to prosecute criminal proceedings for violations of Section 101-b, as amended, of the ABC Law.

B. The Law Concerning Liquor Prices Prior to Ch. 531.

Section 101-b of the ABC Law was enacted in 1942 to promote temperance by preventing undue stimulation of sales of alcoholic beverages arising from the granting of discounts, rebates, allowances, and free goods to "selected licensees" by certain manufacturers and wholesalers.

Generally, Section 101-b prohibits distillers and wholesalers from discriminating between like situated customers (1) in price, (2) in discounts for time of payment or (3) in quantity of merchandise. Thus, a distiller must offer the same base price and the same discounts to all those New York wholesalers to whom he sells. Similarly, New York wholesalers must offer the same base price and the same percentage discounts to all their retail customers.

Except for a maximum 2 per cent quantity discount and a 1 per cent discount for payment on or before 10 days from date of shipment, distillers and wholesalers of distilled spirits are prohibited from granting directly or indirectly "any discount, rebate, free goods, allowance or other inducement." ABC Law, Section 101-b-2(b).

To implement these restrictions, Section 101-b-3(a) requires a schedule to be filed monthly by the owner of a brand of liquor, or a wholesaler designated as agent by the owner. The schedule is required to list the bottle and case price to wholesalers plus such information as the brand or trade name, capacity of package, nature of contents, and the age and proof where stated on the label.

A similar schedule of prices and general information is required to be filed by any manufacturer or wholesaler selling the brand in question to retailers.

Likewise, Section 101-c of the ABC Law was enacted in 1950 to promote temperance by eliminating price wars "which unduly stimulate the sale and consumption of liquor and wine. . . ." This section prohibited sales of liquor and wine at retail until the owner of a brand of liquor or wine, his designated wholesale agent, or any wholesaler approved by the State Liquor Authority filed a schedule with the Authority listing the minimum price at which the particular brand could be sold to the consumer. The mandatory resale price maintenance section was enforced by the State Liquor Authority, unlike the ordinary State "fair trade" law which is enforced by private action.

To these restrictions on the right to set one's prices in response to free market conditions at the distiller and wholesaler levels, were grafted the provisions of Sections 7 and 9, Chapter 531, 1964 New York Session Laws, in April 1964.

C. Events Preceding 1964 Legislation to Amend the Alcoholic Beverage Control Law.

In his annual message to the Legislature on January 9, 1963, Governor Nelson A. Rockefeller announced the ap-

pointment of a Moreland Act Commission to undertake a study of the State Liquor Authority's administrative structure, practices and procedures. This Commission, composed of distinguished citizens, made several studies and held a number of hearings in its efforts to become acquainted with the conduct of the alcoholic beverage industry in New York.

After taking voluminous testimony, the Moreland Act Commission concluded that Section 101-c was directly responsible for the occurrence of higher retail liquor prices in New York than in other states. It reasoned that mandatory resale price maintenance tends to thwart the price competition which exists in a normal, vigorously competitive market. The recommendation of the Commission was to the point:

> Section 101-c of the ABC Law, which provides for SLA enforcement of minimum consumer resale prices fixed by the distillers, should be repealed.
>
> (Moreland Commission to Study the Alcoholic Beverage Control Law, Study Paper No. 3 (R. 157).)

The studies of the Commission call for a free competitive market in distilled spirits. At no time did the Commission advocate the maximum price controls embodied in the amendments to Section 101-b which are the subject of this action. The Commission called for the repeal of state enforced retail price maintenance because it felt this artificial price support was responsible for a higher retail liquor price in New York. It believed that after repeal of mandatory retail price maintenance the competition inherent in a free market could be counted upon to give a fair market price to New Yorkers. The Commission did not believe, contrary to the philosophy underlying old Section

101-c of the ABC Law, that high retail liquor prices serve to promote temperance, the sole rationale for legislative regulation of liquor in New York.

D. The New Act.

In accordance with the recommendations of the Moreland Act Commission, Section 101-c of the ABC Law, the mandatory retail price maintenance section, was repealed by Section 11 of Ch. 531.

The rationale for the repeal of Section 101-c is contained in Section 8 of Ch. 531, which states that "fundamental principles of price competition should prevail in the manufacture, sale and distribution of liquor" in New York. Section 8 further states that New York consumers of alchoholic beverages should not be discriminated against by paying "unjustifiably higher" prices for brands of liquor than are "paid by consumers in other states." Section 8 maintains that "price discrimination and favoritism are contrary to the best interest and welfare of the people of this state." It continues by stating the belief that enactment of Section 11, repealing mandatory resale price maintenance, "will provide a basis for eliminating such discrimination against and disadvantage of consumers in this state." Section 8 then goes on to assert the legislative conclusion that it is necessary to enact the maximum price provisions of Section 9 of Ch. 531 which are the subject of this appeal "in order to forestall possible monopolistic and anti-competitive practices designed to frustrate the elimination of such discrimination and disadvantage."

Contrary to the repeated assertions of appellees and the opinion of the majority below, the repeal of mandatory resale price maintenance is not challenged by this appeal.

Section 9 of Ch. 531 adds eight paragraphs to Section 101-b-3 of the ABC Law. These are paragraphs (d)-(k). Paragraphs (d)-(g) of Section 9 place maximum price restrictions upon the sale of non-private label liquors in New York. Under paragraph (d) every schedule of prices to be charged wholesalers during the immediately succeeding month, required by Section 101-b-3(a), must now in effect list prices that are "no higher than the lowest price" given by the brand owner, a wholesaler designated as his agent or by a "related person" to any wholesaler elsewhere in the United States during the immediately preceding month. This is so because an affirmation verified by the party filing the basic schedule and stating that the prices in the schedule are no higher than the lowest charged elsewhere must accompany each such schedule. See ABC Law, Section 101-b-3(d) and (e). As noted, the price filed will be the price at which the item must be sold during the immediately succeeding month. Thus, for example, the lowest January price charged outside New York would be filed in the New York price schedule in February and would be the actual New York price in March.

The term "related person" is defined as any person in whose business the brand owner has a direct or indirect interest. It also means any person whose "exclusive, principal or substantial business" is the sale of a brand or brands of liquor "purchased from such brand owner or wholesaler designated as agent." A related person also includes one who has "an exclusive franchise or contract to sell such brand or brands." ABC Law, Section 101-b-3(d) and (f).

Pursuant to paragraph (f) a brand owner or wholesaler designated as agent by the brand owner must af-

firm that the prices listed in the basic schedule of prices to New York retailers filed by New York wholesalers are no higher than the lowest price at which such item of liquor was sold by the brand owner, the wholesaler designated as his agent, or *any* "related person" doing business anywhere else in the nation to any retailer, exclusive of state retail agencies, elsewhere in the United States during the immediately preceding month.

Similarly, a wholesaler who is somehow determined to be a person "related" to a brand owner may not sell to New York retailers unless the brand owner or his agent affirms that the wholesaler's New York price schedule contains prices no higher than the lowest charged retailers elsewhere in the United States by the brand owner, his agents, or any person selling to retailers anywhere else in the nation who is "related" to the brand owner or his agents.

The definition of a "related person" in paragraph (f) is virtually the same as that in paragraph (d).

If a New York wholesaler is willing to attest that he is not a "related person", he may file a price schedule and affirmation containing a price of his own choosing, if his sales are confined to New York State only. However, should a non-related person wholesaler sell in any other state, he must affirm that his New York price is no higher than the price at which he sold in the other state.

Should an appropriate affirmation of a price no higher than the lowest granted elsewhere not be filed as required, paragraph (h) prohibits the sale of such item during the period covered by the price schedule in question.

Before a brand owner affirms that the price contained in a particular schedule is no higher than the lowest granted

elsewhere, he is required by paragraph (i) to make "appropriate reductions" for all "discounts in excess of those to be in effect under such schedule [the maximum 2 per cent quantity and 1 per cent time discount], and all rebates, free goods, allowances and other inducements of any kind whatsoever offered or given to any such wholesaler, state (or state agency) or retailer" purchasing the item elsewhere in the United States. Thus the lowest "price" which must be accorded to New York wholesalers and retailers is a "net" price reflecting all the above-described deductions which are offered or given to purchasers in other states. Excluded from such "appropriate reductions" are differentials which reflect differences in state taxes and fees and "the actual cost of delivery." Paragraph (i) defines state taxes and fees as "excise taxes imposed or the fees required by any state or the District of Columbia upon or based upon a gallon of liquor, and the term 'gallon' shall mean one hundred and twenty-eight fluid ounces."

A person making a false statement in any affirmation filed pursuant to paragraphs (d)-(g) will be deemed guilty of a misdemeanor pursuant to paragraph (j) of Section 9. Upon conviction, the maximum penalty will be a fine of $10,000 or imprisonment for a term of not more than 6 months or both. Pursuant to Section 7, paragraph 6 of Ch. 531, a company whose prices are improperly affirmed can lose its New York license and forfeit its bond.

By paragraph (k) a person convicted in accordance with paragraph (j) may not be able to affirm a price schedule for up to three months, at the discretion of the State Liquor Authority.

To summarize the significant changes in the amendments to Section 101-b-3 which are the subject of this

appeal: (1) those selling to wholesalers and certain wholesalers selling to retailers cannot sell to their customers until the brand owner affirms that the price to wholesalers and retailers quoted for an item of liquor (an item includes each separate bottle size of each brand) in the price schedules is no higher than the lowest price at which the item was sold elsewhere in the United States during the immediately preceding month by the brand owner or a person "related" to the brand owner; (2) these prices must reflect all allowances, discounts and other inducements given elsewhere to any wholesaler or retailer in the United States; (3) if the brand owner fails to file the affirmation, neither he nor the independent "related person" wholesalers of that brand may sell it in New York for the period of the price schedule —one month; (4) the new amendments are penal in nature, and one making any false statement in the affirmation is subject to prosecution for a misdemeanor and possible revocation of his license to sell in New York.

Section 101-c of the preexisting ABC Law is repealed and there is no longer any mandatory resale price maintenance covering liquor in New York. As with the basic price schedules of Section 101-b-2 and 3, the no higher than the lowest price provisions do not apply to brands of liquor that are owned exclusively by a single retailer.

E. Appellants' Operational and Pricing Structure.

Generally, distilled spirits are marketed under trade or brand names owned by the distiller, his designee or a foreign manufacturer, although some are marketed by wholesalers and retailers using their own "private labels."

The bulk of appellant-distillers' merchandise is marketed in the several states through independent wholesalers

not having an exclusive franchise (R. 205). These wholesalers are under no legal compulsion to inform a distiller of the price at which they sell to retailers (R. 300, 303, 305).

Certain appellant-wholesalers conduct a nationwide wholesale business selling the brands of appellant-distillers and their own brands. However, the majority of appellant-wholesalers are independent New York merchants who conduct their operations only within the State of New York.

Due to varying regulations in each state affecting excise tax levels and conditions of sale, market limits in the distilled spirits industry are conterminous with state geographical boundaries (R. 245). Mississippi is the only completely dry state in the Union. Thus, there are at least fifty distinct market areas when the District of Columbia is included. However, within each market there exists a high degree of competition between different brands within the same generic type of liquor and, more broadly, between the generic types themselves (R. 245). An individual distiller may sell as many as 150 brands of various types of liquor within one market. These brands are sold in several different bottle sizes. Each brand may face a different competitive situation in each market. Seasonal variations in drinking habits and consumer demand affect, as in many other commodities, the net price which the product can command at any given time in any given market. Similarly, regional competition in the form of private labels and popular local brands have the result of temporarily affecting the price of a nationally known brand (R. 227).

New York sales account for some 12% of the national consumption of distilled spirits (R. 241).

Private label liquor sales account for 12% of the total sales of New York retailers carrying such brands. Yet the

prices at which retailers purchase these labels are not required to be posted nor does the ABC Law impose maximum price limitations upon these brands at any merchandising level.

In any determination of price, whether at the distiller or wholesaler levels, the element of cost is a primary consideration. Currently, Metropolitan New York wholesalers operate on one of the lowest levels of profit in the country. On the average they realize less than one per cent net profit on their net sales before taxes (R. 247). This is largely because their net operating expenses average 10.88% of net sales (R. 247). In 1963 upstate New York wholesalers averaged a net profit of .66% on their net sales before taxes. Their operating expenses averaged 11.5% of net sales (R. 247). These expense figures are among the highest in the nation. The national figures for firms of comparable sales volume are: operating expenses 9.87% of net sales and before-tax profits 1.42% (R. 247). This profit figure is roughly double that of reporting New York firms. As an example of contrast, Florida wholesalers in 1963 had operating expenses of only 7.34% of net sales and profits of 1.52%. Other large metropolitan centers such as St. Louis and Chicago had figures better than the national average (R. 247). The maximum price provisions in the 1964 amendments to Section 101-b do not make allowance for these differences in the cost of doing business.

Nor have distillers realized an excessively high rate of profit at the expense of New York consumers. The actual facts reflect a different situation. Of the 65 industries analyzed in 1963 by the First National City Bank, the distilling industry ranked 53rd in percent of return on invest-

ment, behind such others as automobiles, soft drinks, drugs and medicines (R. 244).

F. Opinions Below.

Four judges of the Court of Appeals of the State of New York voted to affirm the judgment of the Supreme Court, Special Term, which was affirmed by the Supreme Court, Appellate Division, Third Department, holding that the Twenty-first Amendment to the Constitution of the United States shielded the challenged sections of Chapter 531 from an attack based upon violations of other sections of the federal constitution. To the majority of the Court of Appeals, the ability of the State to prohibit entirely the traffic in liquor *ipso facto* allows the legislature, once it decides to permit the sale of distilled spirits, to regulate the industry in any manner it sees fit, without regard to federal constitutional guarantees.

The majority found that even though the effect of Section 9 of Ch. 531 is to force appellants to tie their prices in New York to those prevailing in other states, there is no resulting interference with interstate commerce (R. 346). The majority went on to say that if the effect of Section 9 of Chapter 531 "on New York is too low a price they have it within their power to raise the lowest price elsewhere" (R. 346). The majority cited opinions of this Court rendered shortly after ratification of the Twenty-first Amendment to the Constitution of the United States for the proposition that the commerce clause, Article 1, Section 8 of the Constitution of the United States, is no longer applicable to the distilled spirits industry.

Nor did the majority of the Court of Appeals feel that Section 9 violates the supremacy clause of the federal con-

stitution, Article VI, because of conflict with the federal Sherman and Robinson-Patman Acts. The majority opinion took the view, notwithstanding the anti-trust purpose of Section 9 clearly stated in Section 8, that Section 9 cannot be "transformed" into an antitrust measure (R. 349).

Three judges of the Court of Appeals stated that while a state is indeed empowered to prohibit the sale of distilled spirits entirely, if it chooses to allow the industry to operate it must do so in a constitutional manner. The dissenting judges chose to set forth at length the reasons why Section 9 of Chapter 531 is not a valid function of the State's police power. However, in his opinion Chief Judge Desmond emphasized that he was not overlooking "a number of other troublesome aspects of these amendments", even though the dissenting opinion failed to discuss them at length (R. 354).

The decision of the majority of the Court of Appeals betrays these fundamental faults:

1. It assumes that the Twenty-first Amendment to the federal constitution has rendered the commerce clause a dead-letter in the area of alcoholic beverages and permits the states to control the alcoholic beverage industry in a way which has a real and marked effect on the conduct of the industry in other states.

2. While not willing to state that the Twenty-first Amendment to the federal constitution can sustain a state act in conflict with a federal act and thus violate Article VI of the Constitution, the majority opinion failed to recognize the sharp conflict of Section 9 of Chapter 531 with federal antitrust acts.

3. In reasoning from the premise that the power to prohibit intoxicating liquor includes the power to regulate arbitrarily if sale is permitted, the majority of the Court of Appeals fell into a logical fallacy which prevented it from realizing that the state has a legal obligation, once it permits alcoholic beverages to be sold within the state, to regulate traffic in this commodity in accordance with constitutional standards.

SUMMARY OF ARGUMENT

I

By Sections 8 and 9 of Ch. 531 the state has attempted to prevent possible future anti-competitive practices by requiring distillers and certain wholesalers in New York to sell at prices no higher than the lowest prices charged to wholesalers and retailers elsewhere in the United States.

A brand name liquor which is sold in other states cannot be sold in New York until a distiller has gathered information as to his prices in other states and the prices of "related person" wholesalers selling the same brand elsewhere in the United States.

However, the court below ruled that the Twenty-first Amendment to the Constitution of the United States insulates Section 9 of Ch. 531 from the charge that it violates other federal constitutional guarantees because Section 9 was said by the majority below to have no effect on appellants' operations outside New York.

Yet at the same time the entirety of the court below recognized that its impact might well extend into other states in at least one instance in that a major economic effect of the New York statute may well be the imposition of artifically higher prices in other states, in order to enable

appellants to continue to do business in the high-cost New York market.

The Twenty-first Amendment to the federal constitution does not give a state plenary power to affect directly the operations of members of the alcoholic beverage industry in other states. *United States* v. *Frankfort Distilleries,* 324 U. S. 293, 299 (1945).

Early decisions of this Court such as *State Board of Equalization* v. *Young's Market Co.,* 299 U. S. 59 (1936) and *Joseph S. Finch & Co.* v. *McKittrick,* 305 U. S. 395 (1939) cannot serve to protect state legislation having these grievous interstate consequences. None of those cases involved statutes having the slightest price or marketing impact in other states. Nor did the Court in those cases have before it an attempt by a state to seize upon its economic power to force the alcoholic beverage industry to price in the legislating state at a level having no relation to competitive market prices.

None of the statutes in the early cases represented an attempt to control possible anti-competitive tendencies. And they did not require the objects of the legislation to undertake private action in other states violative of the terms and policies of the Robinson-Patman and Sherman Acts. Section 9, having this effect, is clearly distinguishable from the statutes at issue in the early cases.

The Twenty-first Amendment and the commerce clause of the federal constitution must be read concurrently. *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.,* 377 U. S. 324 (1964). The Twenty-first Amendment cannot protect state alcoholic beverage legislation when it is in conflict with federal laws governing interstate trade or traffic. *Department of Revenue* v. *James B. Beam Distilling Co.,* 377

U. S. 341 (1964). See *Nippert* v. *City of Richmond*, 327 U. S. 416 (1946).

II

Section 9 of Ch. 531 is in direct contradiction with the terms of the Robinson-Patman Act, 15 U. S. C., §§ 13(a)-(f), 21(a) (1949). By the same token, Section 9 denies appellants the right to engage in certain business practices which are permitted by that Act. For example, Section 9 assumes that a geographical price differential is an inherently anticompetitive act and requires distillers to correct the situation by lowering their New York prices if they are currently higher than those elsewhere in the country. The Robinson-Patman Act, on the contrary, does not consider geographical price differentials anti-competitive absent a showing of lessened competition between sellers or buyers as a result of the differential. See *F. T. C.* v. *Anheuser-Busch, Inc.*, 363 U. S. 536 (1960).

Section 2(b) of the Robinson-Patman Act permits a seller to differentiate in price between customers if the seller is making a good faith effort to meet an equally low price of a competitor. However, this defense is not available to a charge under Section 9 of Ch. 531 that a lower price exists elsewhere in the United States for a brand sold in New York.

These are only two examples of how Section 9 is inalterably in conflict with that Act. Such conflict is a direct violation of the supremacy clause, Article VI, of the federal constitution. *Franklin Nat'l Bank* v. *New York*, 347 U. S. 373 (1954).

However, Section 9 of Ch. 531 also does violence to the terms and policy of the Sherman Act, 15 U. S. C., §§ 1-7

(1959). To comply with Section 9, distillers must obtain price information for any given month from their agents and from independent "related person" wholesalers elsewhere in the country, in order to have even the slightest chance of filing accurate affirmations in New York as to their prices and those of "related person" wholesalers. This type of exchange of price information from "related person" wholesalers in other states to the distillers and their New York wholesalers cannot help but be actively condemned by the Sherman Act. Compare *United States* v. *Parke, Davis & Co.*, 362 U. S. 29 (1960), with *United States* v. *Colgate & Co.*, 250 U. S. 300 (1919).

The Sherman Act establishes a policy of economic liberty and seeks free competition in interstate commerce. Mr. Justice Black referred to it as "a charter of economic liberty." *Northern Pacific Railway Co.* v. *United States*, 356 U. S. 1, 4 (1958). Section 9 can only be viewed as an unjustifiable attempt at economic restraint contrary to Sherman Act policy.

The supremacy clause permits no balancing of interest test and no weighing of conflicting policies. Once it is discovered that a state act is in conflict with the terms of federal acts, the state act must be struck down.

III

Section 9 of Ch. 531 attempts to impose a special type of antitrust regulation on a single industry. In so doing, Section 9 is clearly inimical to federal antitrust policy which covers all lines of commerce. In its attempt to so control the alcoholic beverage industry, Section 9 reaches across state boundaries and has real and substantial effects on the conduct of this industry in the remainder of the Union.

Any tendency of the alcoholic beverage industry to price in an anti-competitive fashion is a concern of the federal government and is not a problem local in character. The unique antitrust legislation embodied in Section 9 must have a severe disruptive effect upon federal policy if upheld in this action and if other states seize what would become an opportunity to fashion their own individual concepts as to proper antitrust policy for this or any other industry.

The commerce clause does not permit a state to legislate in a manner disruptive of federal policy nor in a way that would expose citizens to conflicting legislation in other states. See *Bibb* v. *Navajo Freight Lines, Inc.*, 359 U. S. 520 (1959); *Southern Pacific Co.* v. *Arizona*, 325 U. S. 761 (1945).

Nor can New York use its position as the leading market for alcoholic beverages in the country to force distillers and wholesalers into accommodating it with unreasonable prices. This legislative attempt to exact economic advantage in favor of New York purchasers in exchange for the right to sell goods in the largest market in the nation is patently contradictory of the commerce clause. *Hood & Sons, Inc.* v. *Du Mond*, 336 U. S. 525 (1949); *Baldwin* v. *G. A. F. Seelig, Inc.*, 294 U. S. 511 (1935).

IV

Both appellees and the majority of the court below have indulged in the misapprehension that Section 9 of Ch. 531 was enacted for the purpose of reducing prices in New York to wholesalers and consumers. They have further indicated the belief that these no higher than the lowest price pro-

visions were found to be necessary, if reasonable liquor prices are to prevail within the state, by the Moreland Act Commission charged with studying the alcoholic beverage industry in New York.

This view ignores the plain meaning of Section 8 of Ch. 531, which states that Section 9 was not enacted for the purpose of reducing prices in New York to wholesalers and consumers. The repeal of Section 101-c was the measure enacted for this purpose and the only action in this area called for by the Moreland Act Commission. The repeal of Section 101-c has never been challenged by appellants.

Section 8 makes it clear that Section 9 was enacted solely "to forestall possible monopolistic and anti-competitive practices" which might arise in the future. Neither the Legislature nor the Moreland Act Commission claims these practices existed before or at the time of passage of Section 9 nor is there any statement indicating that the rise of these practices was deemed imminent.

Section 9 of Ch. 531 serves no valid police power purpose. According to Section 2 of the New York Alcoholic Beverage Control Law, the sole rationale for legislative restriction on the right to sell alcoholic beverages in New York is the affirmative promotion of temperance. While the Moreland Act Commission disputed the contention that high prices serve to promote temperance, no one has had the temerity to claim that artificially low prices will also serve to reduce the social ills which may result from excessive use of alcoholic beverages.

While this Court has in recent years been reluctant to strike state statutes on substantive due process grounds, it has on several occasions repeated that state legislation

must fall if no demonstrable police power purpose is served. See *Goldblatt* v. *Town of Hempstead*, 369 U. S. 590 (1962); *Williamson* v. *Lee Optical Co.*, 348 U. S. 483 (1955). Section 9 of Ch. 531, either by the standards established by Section 2 of the ABC Law or by the general police power doctrine, fails to satisfy a substantive due process standard.

The definition of a "related person" in Section 9 of Ch. 531, vital in determining which New York wholesalers must sell at a price no higher than the lowest price charged by wholesalers elsewhere in the country, is intolerably vague by standards established by this Court in cases such as *Winters* v. *New York*, 333 U. S. 507 (1948). In this statute, which assesses criminal and civil penalties for failure to make a proper affirmation, a "related person" is one who does a "substantial" part of his business with a particular distiller. Distillers have no way of determining which of the approximately one thousand licensed wholesalers operating in the United States are to be considered "related" to them in such a manner as to require the distillers to obtain price information from these wholesalers. Nor do New York wholesalers have any means to determine if they are "related" to one from whom they purchase individual brands of alcoholic beverages.

V

By applying the no higher than the lowest price standards to only certain New York wholesalers and allowing others to sell at a price of their own choosing, Section 9 of Ch. 531 makes a discriminatory classification which is forbidden by the equal protection clause of the Fourteenth Amendment. There is no generic difference between whole-

salers who must comply with the law and those free to set their own prices.

It is only those wholesalers who do a "substantial" part of their business with a particular distiller that are affected by the Act, while those who are not deemed to be included within this standard are free from its restrictions. Legislation cannot constitutionally discriminate in its application between those in a group having definite attributes of identity and no substantial differences. See *Reynolds* v. *Sims,* 377 U. S. 533 (1964).

VI

Section 7 of Ch. 531 has no relation to the avowed legislative purpose of forestalling possible future antimonopoly practices, and it is thus capricious and constitutionally unreasonable.

ARGUMENT

POINT I

The Twenty-first Amendment to the Constitution of the United States does not validate a New York statute which levies an economic burden on the operations of the distilled spirits industry in other states and which does not promote temperance or check evils peculiar to the trade in alcoholic beverages in New York.

Section 2 of the Twenty-first Amendment to the Constitution of the United States proclaims:

> The transportation or importation into any State, Territory or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited. Ratified December 5, 1933.

The Twenty-first Amendment was not proposed or adopted in a historical vacuum. In abandoning prohibition as a national policy, Congress sought to embody in Section 2 of the Twenty-first Amendment, as constitutional policy, the principles of pre-prohibition statutory enactments such as the Webb-Kenyon Act, 37 Stat. 699. See 76 Cong. Rec. 4170 (1933); *id.* at 4141.

Nothing in the Amendment, its historical background, nor in fundamental principles of constitutional law can support the thesis that it permits a state to override constitutional guarantees by legislative action not necessary to effectuate state internal policy regarding the exercise of police power over the traffic in intoxicating liquor within its borders. New York may not pervert the Twenty-first Amendment by using it as a cloak for legislation contradictory to federal antitrust policy and burdensome upon operation of the alcoholic beverage industry in other states.

A major case concerning the Amendment realized that it "has not given the states plenary and exclusive power to regulate the conduct of persons doing an interstate liquor business outside their boundaries." *United States* v. *Frankfort Distilleries,* 324 U. S. 293, 299 (1945).

The opinion below of the Court of Appeals concluded that, regardless of whether Section 9 of Ch. 531 is an illegal burden on interstate commerce, it is protected by the Twenty-first Amendment because Section 9 does not affect appellants' operations outside New York.

An examination of some of the undeniable effects of Section 9 on appellants' operations in other states and on the administration of alcoholic beverage control laws in these states will illustrate the error of the court below.

The uncontroverted facts in this case show that the cost of doing business in New York for distillers and wholesalers is among the highest in the country. See p. 15, *supra*. The sale of alcoholic beverages in New York accounts for approximately 12% of the nation's total. See p. 14, *supra*.

If all prices in New York State were limited to the lowest price charged in any single sale in the low-cost states—as mandated by the statute—many New York wholesalers would be forced out of business unless distillers could somehow force "related person" wholesalers in other states to charge their customers artificially high prices. Similarly, distillers will have to ignore lower selling expenses in other states and sell at artificially high prices in other states or else sell at a loss in New York.

Thus one of the actual major economic effects of the New York statute may well be the imposition of artificially higher prices in other states at rates which will enable each of the distillers and wholesalers to continue to do business in New York State. This fact was recognized by the entirety of the Court of Appeals (R. 347, 354). This probable effect on business and commerce in other states is not merely incidental to a valid regulation of prices for sales within New York State—it is a major economic effect of the legislation.

Similarly, a producer, nationwide wholesaler or importer of branded distilled spirits selling in the largest market in the nation will not be free to determine his price in response to competitive situations in other markets without determining the effect such price will have on his New York market. Contracts of sale in other states will be negotiated with concern as to their effect on the

New York price structure. One will certainly be loath to grant temporarily a promotional discount on 100 cases of his product in, say, Arizona to meet a local competitive condition if he will be required to grant the same discount on the sale of 10,000 cases in New York.

Likewise, distillers wishing to sell to New York "related person" wholesalers must affirm that the prices at which these wholesalers sell to New York retailers are no higher than the lowest prices at which "related person" wholesalers in other states sold to retailers elsewhere in the United States during the immediately preceding month. To make this affirmation distillers will have to secure price information from "related person" wholesalers in other states and insist upon the filing of the lowest of these prices by New York wholesalers who come within the "related person" definition. Section 9 puts the distiller in the position of risking a Sherman Act prosecution by collecting and disseminating this information and acting as a conduit for what amounts to a price agreement between certain New York wholesalers and the wholesaler who sells the particular brand at the lowest price elsewhere in the United States during a particular month. *Cf. American Column & Lumber Co.* v. *United States,* 257 U. S. 377 (1921). It can also be said that the distiller, by refusing to affirm the price schedule of a New York wholesaler who lists prices higher than the lowest collected by the distillers from wholesalers around the country, is engaging in conduct prohibited by the Sherman Act. See pp. 44-46, *infra.*

Of course this gathering of price information made necessary by Section 9, which may lead to Sherman Act prosecutions, will be conducted outside of New York and thus clearly transcend the limits of the Twenty-first Amend-

ment set forth in *Frankfort Distilleries, supra.* Assuming arguendo that the state is permitted by the Twenty-first Amendment to burden interstate commerce virtually as it pleases *within the boundaries of the state, Frankfort* makes it clear that the Twenty-first Amendment will not allow a state to enact liquor legislation which leaves a distiller no choice but to violate basic federal antitrust laws *in another state* if he is to comply with the state act. When a state does so "it demands private conduct which the Sherman Act forbids." *Schwegmann Bros.* v. *Calvert Distillers Corp.,* 341 U. S. 384, 389 (1951).

So, too, Section 9 will impose upon other state liquor legislation. For example a California regulation allowed wholesalers to grant a maximum 8% discount for quantity purchases but, like many other states, placed no restrictions on discounts offered by distillers. See Chapter 1, Title 4, California Administrative Code, Rule 100(1). New York only allows a 2% liquor quantity discount, but by the terms of Section 101-b-3(i), any discount in excess of 2% accorded elsewhere must be given to New York purchasers. Would distillers be willing to grant California purchasers discounts in excess of 2% if that would affect their New York prices? Would not Section 101-b-3(i) have the practical effect of negating the California rule? A seller in California would be required to weigh any decision to grant a discount in excess of 2% by the effect this would have on his profits in New York as well as California.

Thus, from what has been said above, it is evident that the primary economic impact of Section 9 will fall upon industry operations without the borders of New York. Only when pricing policies and reporting procedures are established in other states will Section 9 have

any effect on operations in New York. New York will not experience the economic impact of this section on prices until some two months after the prices are charged in other states. Section 9 basically requires only one act for compliance: the affirmation of their own and "related person" wholesaler price schedules. But before this single act of compliance can be executed with the slightest degree of security, distillers must engage in price gathering and reporting activities in other states. The federal constitution does not allow one state to interfere with commerce in and among the other states in this manner, see p. 50, *infra*, and the Twenty-first Amendment has never been said to sanction such legislation.

It is true that early decisions of this Court cited by the majority below appeared to state that the commerce clause in particular and perhaps other sections of the federal constitution in general are virtual dead letters when alcoholic beverage regulation is at issue. These cases generally allowed discriminatory charges and other burdens to be imposed upon out of state alcoholic beverages and also allowed one state to place these burdens on the alcoholic beverages brought in from a second state while allowing these beverages to be imported without discriminatory treatment when introduced from a third state. See, *e.g.*, *Joseph S. Finch & Co.* v. *McKittrick*, 305 U. S. 395 (1939); *Indianapolis Brewing Co.* v. *Liquor Control Comm'n*, 305 U. S. 391 (1939); *Mahoney* v. *Joseph Triner Corp.*, 304 U. S. 401 (1938); *State Board of Equalization* v. *Young's Market Co.*, 299 U. S. 59 (1936).

However, none of the statutes at issue in these cases required a prior act in another state by industry members as a condition of compliance with the challenged legislation. None of the statutes were claimed to have had the slightest

price or marketing impact in other states. And not one of these states seized upon its economic power to force businesses operating in interstate commerce to price at a level having no regard for the economics of the market in the legislating state.

The statutes in these cases were concerned mainly with protecting a local industry through the imposition of obstacles on out of state producers. Whether this was a goal which should have been protected by the Twenty-first Amendment is obviously not the question here. (For the view that these early cases went too far in permitting the Twenty-first Amendment to be used for economic discrimination between the states, see Abrahamson, *Whiskey—The Incidence of Public Tolerance in Price Policy* printed in Walton, Hamilton and Associates, *Price and Price Policies*, 395, 425-26 (1938).) But it is clear that the cases acceding to this protection of home-grown industry cannot stand as authority when a state demands unjustifiably lower prices, even though one result, admittedly, may be higher prices in other states.

This Court has failed to endorse its earlier general statements regarding the breadth of the Twenty-first Amendment. In 1945 it was emphasized that federal control over the interstate aspects of the alcoholic beverage industry has not been entirely delegated to the states by the Twenty-first Amendment as the early cases imply. *United States* v. *Frankfort Distilleries*, 324 U. S. 293 (1945).

Commentary following the *Frankfort* decision approved this restrictive view of the scope of the Twenty-first Amendment, a note in the Yale Law Journal stating:

> The language of Section Two does not purport to grant to the states a plenary power unrestricted by

pre-existing constitutional limitations. True, it prohibits the transportation and importation of liquors into a state in violation of "the laws thereof," but it would not require boldness beyond the capacity of the Supreme Court to interpolate the word "proper" to modify "laws." This interpolation is supported by the canon that a construction which raises a conflict between parts of a constitution is inadmissible when, by reasonable interpretation, the parts may be made to harmonize. In other cases the Courts have freely implied similar limitations to seemingly all-embracing language in order to effectuate the purpose of an amendment. Note, *The Twenty-First Amendment Versus the Interstate Commerce Clause,* 55 Yale L. J. 815, 816 (1946).

In the past Term this Court struck down state legislation which attempted to overreach state borders in regulating alcoholic beverages. *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.,* 377 U. S. 324 (1964). The State of New York attempted to exert jurisdiction over a corporation engaged in the business of selling liquors to departing airline travelers. In attempting to justify its act, the State Liquor Authority asserted that the commerce clause does not apply to the state regulation of liquor. In support of this claim, the Authority relied upon the line of cases cited at p. ___, *supra,* much in the same way it has relied on those cases in the present action.

This Court remained faithful to its decision in *Frankfort* and rejected this view. The opinion of Mr. Justice Stewart countered the assertion that the commerce clause had been repealed by the Twenty-first Amendment by calling this view "an absurd oversimplification." 377 U. S. at 332. Mr. Justice Stewart stated:

> Both the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution. Like

other provisions of the Constitution, each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case. 377 U. S. at 332.

The majority opinion of the Court of Appeals of the State of New York found that not only does the Twenty-first Amendment eliminate any commerce clause considerations, but that it also can be used to protect state legislation in direct conflict with federal statutes (R. 349). While the majority's interpretation of the relationship between the Twenty-first Amendment and the commerce clause violates the balancing test of *Idlewild,* its view that the Twenty-first Amendment can serve to allow state liquor legislation in direct conflict with federal statutes is even more in conflict with decisions of this Court.

Shortly after rendering the *Frankfort* decision, the Court made the following observation in *Nippert* v. *City of Richmond,* 327 U. S. 416, 425 n. 15 (1946):

> "Thus, even the commerce in intoxicating liquor, over which the Twenty-first Amendment gives the States the highest degree of control, is not altogether beyond the reach of the federal commerce power, *at any rate when the State's regulation squarely conflicts with regulation imposed by Congress governing interstate trade or traffic . . .*" (Emphasis added.)

Of course the Sherman and Robinson-Patman Acts are examples of this type of congressional legislation. See pp. 36-46, *infra.*

In a companion case to *Idlewild, Department of Revenue* v. *James B. Beam Distilling Co.,* 377 U. S. 341 (1964), it was held that where a state enactment affecting intoxicating liquors is contrary to an explicit command of the Consti-

tution—in that case Article I, Section 10, the export-import clause—the Twenty-first Amendment will not save the state statute. Mr. Justice Stewart, again writing for the majority, averred:

> . . . What is involved in the present case, however, is not the generalized authority given to Congress by the Commerce Clause, but a constitutional provision which flatly prohibits any State from imposing a tax upon imports from abroad . . .
>
> This Court has never so much as intimated that the Twenty-first Amendment has operated to permit what the Export-Import Clause precisely and explicitly forbids . . . 377 U. S. at 344-46.

Beam also serves as a warning that the Twenty-first Amendment will not protect the attempt of Section 9 to require foreign producers to make their prices in other states of the country a basis for their New York prices. Because the terms under which import trade may be conducted necessarily involves foreign relations, any such restrictions can only be imposed by Congress or the federal executive.

If the decisions in *Idlewild, Beam, Nippert* and *Frankfort* are compromised, not only will state antitrust legislation in conflict with federal enactments be encouraged but the way will be clear for states to pass with impunity any legislation directed towards the alcoholic beverage industry in conflict with *any* federal act, notwithstanding how remote the state legislation may be from the protection of the public from the alleged social evils of liquor. The most demagogic type of state legislation could ensue. States will be free to pass legislation which could, among other things, forbid racially mixed taverns, and discriminate on the basis

of race, sex or any other criteria between those allowed to obtain liquor licenses or in any other way operate an alcoholic beverage business. See generally Comment, 25 Calif. L. Rev. 718, 728 (1937).

Such a possible result of extreme application of the Twenty-first Amendment has not escaped judicial concern, for the Sixth Circuit rejected a claim of state absolutism in the realm of liquor legislation based upon the Twenty-first Amendment when it observed:

> Followed to its logical conclusion, the appellant's construction, if valid, would mean that the federal government no longer has power to punish theft of intoxicants from interstate shipments of alcoholic beverages under the authority of the so-called Car Seal Act, *nor to regulate or prohibit unfair trade practices in respect to such commodities through the Federal Trade Commission,* nor to regulate tariffs through orders of the Interstate Commerce Commission, nor to prohibit unfair labor practices affecting commerce in intoxicants by brewers or distillers under the authority of the National Labor Relations Act, 29 U. S. C. A. § 151 et seq., nor to prescribe minimum wages or maximum hours for employees in such enterprises under the authority of the Fair Labor Standards Act, 29 U. S. C. A. § 201 et seq. These implications demonstrate the tenuousness of the appellant's broad contentions. *Jatros* v. *Bowles,* 143 F. 2d 453, 455 (6th Cir. 1944). (Emphasis added.)

The foregoing discussion readily demonstrates the tenuousness of sweeping generalizations concerning the scope of the Twenty-first Amendment. This Court is aware that there are real limits upon state power to

legislate freely in the realm of alcoholic beverages. As succeeding sections of this Brief will illustrate, this maximum price legislation clearly violates the supremacy and commerce clauses of the federal constitution. It is submitted that this Court should not allow the Twenty-first Amendment to shield this legislation, which seeks to cure no existing evil in the alcoholic beverage traffic in New York and has immediate and substantial impact upon the operations of the industry in other states.

POINT II

The provisions of Section 9 requiring distillers and wholesalers to offer New York purchasers a price no higher than the lowest price charged elsewhere violate the policy and terms of federal antitrust acts and are thus in conflict with the supremacy clause of the Constitution of the United States.

Section 8 of New York Session Laws, 1964, Ch. 531, states that Section 101-c of the ABC Law, providing for mandatory resale price maintenance of branded distilled spirits, is being repealed because it has resulted in price discrimination and disadvantage to New York consumers. This discrimination, the Legislature declares, has taken the form of unjustifiably higher prices being charged to New Yorkers, in comparison with prices charged consumers in other states. However, Section 8 continues by implying that manufacturers and wholesalers of branded distilled spirits might attempt to frustrate the elimination of price discrimination and disadvantage declared to be the result of mandatory resale price maintenance by engaging in "monopolistic and anti-competitive practices" once Sec-

tion 101-c of the ABC Law is repealed. It thus becomes a matter of "legislative determination" that the no higher than the lowest price provisions contained in Section 9 are needed to prevent manufacturers, distributors and importers of branded distilled spirits from frustrating the policy of encouraging "fundamental principles of price competition" inherent in the revocation of mandatory resale price maintenance.

Stripped of its ambiguous verbiage Section 8 states that state-enforced resale price maintenance has produced unjustifiably higher consumer prices which may continue in spite of the repeal of Section 101-c, and it is only through special anti-price discrimination and anti-monopoly legislation, directed only at certain segments of the branded distilled spirits industry, that the possible continuance of this presumed inequitable situation may be avoided. The Legislature impliedly believes that unregulated pricing policies at the distiller and wholesaler levels will not produce free and untrammeled competition but may lead to practices which cannot be policed by existing federal and state antitrust laws. It should be noted that while the Legislature struck down state-enforced resale price maintenance, it continued to permit brand owners to avail themselves of the provisions of the Feld-Crawford Act, N. Y. Gen. Bus. Law, § 369-a. The Feld-Crawford Act is the general New York fair trade statute.

Keeping in mind that the legislative purpose is to "forestall possible monopolistic and anti-competitive practices" which would, if not controlled, lead unjustifiably to higher prices for New York consumers, a comparison of this state antitrust legislation with federal acts on the same subject

will demonstrate the serious federal constitutional question involved.

By juxtaposing the Robinson-Patman Act, 15 U. S. C., §§ 13(a)-(f), 21(a) (1959), it becomes apparent that the New York act, designed to thwart potential price discrimination, is in direct conflict on several counts with this federal statute having the same purpose.

In enacting the maximum price provisions of Section 9 of Ch. 531, the New York Legislature has failed to make allowance for different market and competitive situations in different areas of the country or for variations in the cost of doing business in different states, aside from actual delivery and state excise gallonage tax expenses. Exemplary of this is the fact that all allowances, rebates, or other inducements given in other markets which contribute to the lowest net price at which a brand of liquor is sold elsewhere in the United States are required to be accorded to New York buyers, regardless of whether giving these promotional allowances to buyers in other states in fact affects the competitive position of New York sellers or purchasers. This is in clear contrast with Section 2(a) of the Robinson-Patman Act, which makes it illegal for a seller to discriminate in price between different purchasers of commodities of like grade and quality only when "the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce . . ."

The New York rule, however, is absolute. It makes no difference if price differentials in various states in no way tend to lessen competition or create a monopoly between buyers or sellers in New York or destroy or prevent competition in any other state. The Robinson-Patman Act does

not condemn mere geographical price differentials absent a showing of lessened competition between the sellers or buyers as a result of the differential. See *F. T. C.* v. *Anheuser-Busch, Inc.,* 363 U. S. 536 (1960); *Sachs* v. *Brown-Forman Distillers Corp.,* 134 F. Supp. 9 (S.D.N.Y. 1955); *In the Matter of General Foods Corp.* (I), 50 F.T.C. 885 (1954). Thus, what is permitted by the Robinson-Patman Act is prohibited by Section 9 of Ch. 531.

Moreover, Section 2(a) of the Robinson-Patman Act does not render illegal price differentials which merely reflect differences in the cost of sale resulting from differing quantities "in which such commodities are to such purchasers sold or delivered."

Section 101-b-2(b) of the ABC Law, it will be remembered, places a maximum quantity discount of 2% on sales of liquor to New York customers. If a larger quantity discount is offered to customers in other states and such discount results in the lowest price offered in the United States, that part of the discount which exceeds 2% must be granted to New York customers, regardless of the actual amount of goods ordered by the New York customer and without regard to whether such discount can be "cost justified" under the Robinson-Patman Act. See ABC Law, Section 101-b-3(i). Thus, under the terms of the Robinson-Patman Act a quantity discount may be offered only when "cost justified", but if such a legitimate differential were a factor in the lowest price charged elsewhere in the United States, one cannot sell branded distilled spirits in New York unless the same discount is granted New York customers where it may be unjustified and hence discriminatory against one's competitors selling in New York State. *Cf. F. T. C.* v. *Anheuser-Busch, Inc.,* 363 U. S. 536 (1960). What

is required under Section 9 of Ch. 531 is prohibited by the Robinson-Patman Act.

Section 2(b) of the Robinson-Patman Act allows the seller to differentiate in price between his customers if the seller can demonstrate that the price differential is "made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor."

This Court has specifically ruled that the purpose of this provision is to abet what is inherent in our competitive system, *i.e.*, to allow a seller to defend himself by meeting his competitor's price. See *Standard Oil Co.* v. *F. T. C.*, 340 U. S. 231, 248-49 (1951). The right to reduce prices under such circumstances is thought to be essential in any anti-price discrimination act. The *1955 Att'y Gen. Nat'l Comm. Antitrust Rep.* discussed this concept at length on p. 181:

> Whatever the interpretation of the substantive price discrimination offense, we think that a seller's right to meet a competitor's prices by granting price differentials to some customers without reducing his prices to all must remain an essential qualification to any anti-price discrimination law. For a seller constrained by law to reduce prices to *some* only at the cost of reducing prices to *all* may well end by reducing them to *none*. As the Federal Trade Commission recently recommended to Congress, "the right to meet a lower price which a competitor is offering to a customer, when this is done in good faith, is the essence of competitive economy." Anything less, we think, would move the price discrimination statute [the Robinson-Patman Act and perforce Section 9 of Ch. 531] into irreconcilable conflict with the Sherman Act.

The New York law grants no such exemption for price differentials between customers in New York and other states. Should a manufacturer or wholesaler of branded distilled spirits reduce his price in another state to meet competition from another manufacturer or wholesaler, who may or may not sell in New York, with the result that the net price becomes the lowest quoted anywhere in the United States for the particular brand, that brand of liquor cannot be sold in New York unless the same price is quoted to the appropriate New York purchasers. The seller of a brand will be compelled to grant an unearned discount in New York or be in violation of Section 9, even though the Robinson-Patman Act realizes the value to competition inherent in such price differentials. Section 9 of Ch. 531 would perforce have the effect of eliminating price as an aspect of meeting competition in these markets. It would result in a price reduction to no one, regardless of the state of individual markets.

Moreover, while manufacturers at least have the choice of whether to engage in such price competition, New York wholesalers do not. If a wholesaler in another state lowers his price to retailers to meet local competition and that price becomes the lowest at which such brand is being sold at wholesale elsewhere in the United States, New York wholesalers who are somehow determined to be "related persons", without regard to differentials in the cost of doing business, profit margins or competitive pressures, must give that same price to New York retailers or else breach Section 9 of Ch. 531.

Sections 2(d) and (e) of the Robinson-Patman Act, taken together, prevent a seller from either paying a buyer

for promotional services furnished the seller by the buyer or from granting or furnishing such services to the buyer unless the seller accords other *competing buyers* the same services on proportionately equal terms. If the purchasers are not in competition with one another, then the seller may grant disproportionate services and/or allowances. See Austin, *Price Discrimination,* 117 (1950).

However, the no higher than the lowest price amendments of Section 9 require a manufacturer or wholesaler of branded distilled spirits, who grants allowances, rebates or other "inducements of any kind whatsoever" to buyers in other states, to provide the same discounts to New York customers if these discounts have the effect of making the total net price the lowest quoted anywhere in the United States. Requiring a seller to give his New York customers the same promotional discounts given customers not in competition with New York purchasers is yet another example of how the new amendments to Section 101-b compel distillers and wholesalers of branded distilled spirits to price their goods in a manner not mandated by the Robinson-Patman Act.

Not only are the means used by Section 9 in conflict with the Robinson-Patman and Sherman Acts, but the basic predicate contained in Section 8 of Ch. 531 is not in harmony with the federal antitrust policy.

Reductions in price in various marketing areas may certainly be the result of normal competitive activity. Different prices in different markets are not only a characteristic of competition—they are also an objective of competition. In fact, in numerous suits the Federal Trade Commission has sought to *require* industries to vary their

prices to accord with differing competitive circumstances in different locations, the very practice condemned by the New York State Legislature in Section 9. See, *e.g.*, *F. T. C.* v. *National Lead Co.*, 352 U. S. 419 (1957); *F. T. C.* v. *Cement Institute*, 333 U. S. 683 (1948); *Clayton Mark & Co.* (Dkt. 4452), *aff'd sub. nom.*, *Triangle Conduit & Cable Co.* v. *F. T. C.*, 168 F. 2d 175 (7th Cir. 1948), *aff'd*, 336 U. S. 956 (1949); *Chain Institute, Inc.* v. *F. T. C.*, 246 F. 2d 231 (8th Cir.), *cert. den.*, 355 U. S. 895 (1957).

The conflict with Article VI, the supremacy clause, is clear, for in terms used by the Court of Appeals of the State of New York in *Quaker Oats Co.* v. *City of New York*, 295 N. Y. 527 (1946), New York has attempted to forbid "what the Government has authorized" or to permit what the Congress has prohibited. 295 N. Y. at 536.

A state act is invalid if it conflicts with either the language or the policy of a federal act even assuming the act to be otherwise in furtherance of the State's police power, which is not the case here. *Franklin Nat'l Bank* v. *New York*, 347 U. S. 373 (1954); *Southern Pacific Co.* v. *Arizona*, 325 U. S. 761 (1945). *Hill* v. *Florida*, 325 U. S. 538 (1945); *Northern Securities Co.* v. *United States*, 193 U. S. 197 (1904), *Local 24, Int'l Bhd. of Teamsters* v. *Oliver*, 358 U. S. 283 (1959). As has been seen, the no higher than the lowest price provisions of Section 9 of Ch. 531 specifically requires private action prohibited by the Robinson-Patman Act and objects to private action permitted by the Robinson-Patman Act.

But the provisions of Section 9 go further; they also contravene the policy embodied in the Sherman Act, 15 U. S. C., §§ 1-7 (1959).

Mr. Justice Black summarized the rationale underlying the Sherman Act when he said

> The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, *the lowest prices,* the highest quality and the greatest material progress, *while at the same time providing an environment conducive to the preservation of our democratic political and social institutions. Northern Pacific Railway Co.* v. *United States,* 356 U. S. 1, 4 (1958). (Emphasis added.)

The New York Legislature—ironically enough by passing legislation ostensibly seeking the same goal as federal antitrust law—subverts this federal doctrine of competition based upon free market demands as well as its own stated desire for the return of "fundamental principles of price competition" in the liquor industry. It commands producers, wholesalers and importers of distilled spirits to grant New York purchasers a price as low as that granted elsewhere regardless of differing competitive factors which may enter into the determination of that lowest price in another state. The Sherman Act does not make price differentials illegal, nor does it necessarily regard parallel prices among competitors as a violation of economic liberty. See *Theatre Enterprises, Inc.* v. *Paramount Film Distrib. Corp.,* 346 U. S. 537, 541 (1954); *United States* v. *International Harvester Co.,* 274 U. S. 693, 708-09 (1927); *United States* v. *United States Steel Corp.,* 251 U. S. 417, 447-50 (1920).

Again, as with the Robinson-Patman Act, the New York provisions regarding maximum liquor pricing are in conflict with the basic elements of federal antitrust policy. The Sherman Act, "a charter of economic liberty" which assumes that government should not interfere with the free market until certain deleterious acts are definitely perceived, is subverted by the amendments to Section 101-b of the ABC Law, which establish a charter of economic restraint rather than economic freedom. A seller of branded distilled spirits in other markets, facing differing competitive situations including varying costs of doing business, must judge his pricing policy in light of the effect it will have upon his New York price. The Sherman Act is a doctrine embracing the traditional American free enterprise concept of unrestrained and vigorous competition, while the New York act is an attempt to coerce purveyors of branded distilled spirits into granting New York retailers a price which may have no relation to the actual competitive situation in New York. That such a policy is antithetical to the rationale of the Sherman Act can hardly be questioned.

As noted earlier, the real effect of Section 9 will be to force distiller-brand owners in some way to coerce related wholesalers elsewhere in the country to disclose to them the lowest price at which such wholesaler sold their respective brands during any one month, thus exposing a distiller to Sherman Act prosecution.

Likewise, the New York wholesaler, having no knowledge of wholesale prices elsewhere in the country, will be required to obtain from the distiller-brand owner the price which the distiller can affirm is the lowest price given elsewhere. Thus the New York wholesaler can sell to retailers only after receiving the approval of the distiller of the price at which he is to sell.

There can be little doubt that such activity, not directly ordered and specifically protected by the terms of Section 9, must give rise to a Sherman Act violation. *Compare United States* v. *Parke, Davis & Co.,* 362 U. S. 29 (1960), *with United States* v. *Colgate & Co.,* 250 U. S. 300 (1919). See *F. T. C.* v. *Beech-Nut Packing Co.,* 257 U. S. 441 (1922); *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.,* 340 U. S. 211 (1951).

The cases discussed above lead to a single conclusion: a state statute, no matter if enacted in furtherance of a valid police power objective as is not the case here, is invalid if its terms are in conflict with the language or policy of a federal enactment. The conclusion is inescapable because the command of the supremacy clause is absolute. Federal laws are the supreme law of the land, and no contrary state enactment can challenge federal supremacy. Unlike other areas of constitutional law, the supremacy clause brooks no balancing test, no weighing of conflicting policies. Should this Court find the sections of Ch. 531 under examination in this appeal in conflict with federal law, the constitutional result mandated by Article VI must be uncompromising.

POINT III

Section 9 places an undue and illegal burden on interstate commerce.

It is clear that the activities of appellants in producing, purchasing and transporting alcoholic beverages in and through the various states of the Union meet the constitutional definition of interstate commerce. Interstate com-

merce includes the actual movement of trade or commerce between the states as well as activities entirely within a state which occur at the beginning, in the middle or at the end of the flow of commerce. See *United States* v. *Employing Plasterers Ass'n,* 347 U. S. 186 (1954); *United States* v. *Yellow Cab Co.,* 332 U. S. 218 (1947); *Mandeville Island Farms* v. *American Crystal Sugar Co.,* 334 U. S. 219 (1948); *United States* v. *Joint Traffic Ass'n,* 171 U. S. 505 (1898). See generally *1955 Att'y Gen. Nat'l Comm. Anti-trust Rep.* 62-65.

The majority of the New York State Court of Appeals flatly stated that Section 9 of Ch. 531 does not interfere with interstate commerce (R. 346). But "Commerce is interstate . . . when it 'concerns more States than one'." *United States* v. *South-Eastern Underwriters,* 322 U. S. 533, 551 (1944) (quoting Marshall, C. J., in *Gibbons* v. *Ogden,* 22 U. S. (9 Wheat.) 1 (1824)). If Section 9 were in force, no appellant would make any contract of sale in any other state without carefully weighing the effect on his New York price schedules in the immediately ensuing month, effective during the next succeeding month. Every transaction in every other state will be subject to interference by this act of the New York Legislature. This fact was implicitly underscored by the entirety of the court below, which recognized that higher prices in other states may well be the result of the enforcement of Section 9 (R. 347, 354).

If they do not accede to the commandment of Section 9 of Ch. 531, appellants can be prohibited from doing business in New York, which accounts for 12% of the total national sales of distilled spirits. Also, any appellants filing a false affirmation face criminal penalties and loss of their licenses—even if the affirmation is innocently in er-

ror. See ABC Law, Section 101-b-3(j). In effect the New York Legislature has ordered appellants to price their goods at a level sufficient to ensure that New York retailers and consumers will receive a price as low as is granted anywhere else in the United States regardless of competitive or cost variations. It is submitted that this legislation, enacted in the guise of antitrust regulation, is an attempt to exact economic advantage in favor of New York purchasers in exchange for the right to sell goods in the largest market in the nation. As such it is patently illegal under the commerce clause. *Baldwin* v. *G. A. F. Seelig, Inc.*, 294 U. S. 511 (1935); *Hood & Sons, Inc.* v. *DuMond*, 336 U. S. 525, 535 (1949) ("*Baldwin* v. *Seelig*, . . . is an explicit . . . and unanimous condemnation by this Court of economic restraints on interstate commerce for local economic advantage, but it does not stand alone."); see Dowling, *Interstate Commerce and State Power—Revised Version*, 47 Colum. L. Rev. 547, 550 (1947).

The line of decision beginning with *Seelig* was reaffirmed recently by *Polar Ice Cream and Creamery Co.* v. *Andrews*, 375 U. S. 361 (1964).

Seelig and its successors have, of course, been severely violated by the no higher than the lowest price provisions of Section 9. From an assumption, unsubstantiated by the State and unacknowledged by appellants, that New York consumers have been paying *unjustifiably* higher prices during the reign of State-imposed mandatory retail price maintenance, the Legislature then proceeds to demand that New York purchasers receive not necessarily fair prices but the lowest prices. No consideration or determination is made whether the lowest price elsewhere in the United States is a fair price for New York buyers. Yet, distillers

and "related person" wholesalers of branded distilled spirits may not sell in the largest market in the United States, accounting for some 12% of retail branded distilled spirit sales, unless they pay tribute exacted by the New York Legislature in the form of the lowest price granted elsewhere in any other locality in the United States, regardless of competitive or market demand or cost of operations. This statutory attempt to secure economic advantage by prohibiting sales to customers in New York unless the lowest price quoted elsewhere is given in New York is an unquestioned violation of the *Seelig* line of cases.

Of course if New York can demand that branded distilled spirits be sold within the State at the lowest possible price there is nothing to prevent other states from making the same requirements before allowing branded distilled spirits to be sold. That a labyrinth of conflicting legislation regarding the subject of lowest prices could result is readily discernible. New York, pursuant to Section 101-b-3 of the ABC Law, requires distillers and wholesalers of branded distilled spirits to file a schedule of prices by the first and the 10th of the month respectively, these prices to be effective in New York during the next succeeding month. As pointed out earlier, the lowest price granted in any other state in the United States in February would be filed in the March schedule of New York prices and would be the price at which the brand is sold in New York in April.

Other states could pass statutes requiring manufacturers and wholesalers of branded distilled spirits to grant the lowest price being given in any other state precisely at the time of sale within the legislating state. Or a state could adopt a statute such as has been declared unconstitutional in an unreported Kansas decision, see *Laird & Co.* v. *Gage*,

Third Judicial District, D.C. No. 898461 (May 7, 1964), and demand that the lowest price given elsewhere in the United States be given in the legislating state for a definite period of time, in the case of Kansas 3 months. It can be seen that the possibilities and combinations are virtually limitless.

It is also apparent that manufacturers and wholesalers of branded distilled spirits, because of conflicting requirements as to when the lowest price is to be determined, could be put in the position of being unable to comply with one act because of the mere fact they were attempting to comply with another. Moreover, the danger arises that the price for distilled spirits might become frozen at a particular level; if a distiller, nationwide wholesaler or importer attempted to raise their prices in any particular state they would more than likely be risking violation of another state's no higher than lowest price statute because of the latter state's legislation being based upon conflicting time sequences.

That the Constitution of the United States will not suffer such a morass of conflicting and onerous legislation to burden interstate commerce is clear. It is because of this possibility that this Court has laid down the doctrine that the Constitution does not permit a state legislature to control the conduct of those engaged in interstate commerce beyond the boundaries of the legislating state. See, *e.g.*, *Boseman* v. *Connecticut General Life Ins. Co.*, 301 U. S. 196 (1937); *Hartford Accident & Indem. Co.* v. *Delta & Pine Land Co.*, 292 U. S. 143 (1934). The New York statute has that effect.

Similarly, this Court has recently held that otherwise unobjectionable rate regulation must fall as an undue bur-

den on commerce if it had discernible effect on rates in other states. *Northern Natural Gas Co.* v. *State Corporation Commission of Kansas,* 372 U. S. 84, 92 (1963).

Whether possible anti-competitive practices should be regulated by the imposition of maximum price legislation on this or any other industry is a question which must be resolved in a nationally uniform manner, involving as it does serious questions of federal antitrust policy. See p. 44, *supra.* The ostensible purpose for enacting Section 9—to forestall possible anti-competitive problems—is not a local matter, without the interest and reach of federal laws capable of correcting latent as well as actual competitive abuses. Even if such a state statute has some redeeming police power virtue, which this one clearly does not, it nevertheless constitutes an undue burden on interstate commerce if it tends to force those bound by it to expose themselves to contrary legislation enacted in other states. See *Bibb* v. *Navajo Freight Lines, Inc.,* 359 U. S. 520 (1959); *Morgan* v. *Virginia,* 328 U. S. 373 (1946); *Southern Pacific Co.* v. *Arizona,* 325 U. S. 761 (1945).

This is not a case where the state has legislated in order to promote temperance, the sole rationale of the New York ABC Law, see p. 55, *infra.* Nor is it one where the state has reasonably requested the distilled spirits industry to contribute its just share of revenue to the state. Rather, this statute is solely an unreasonable, unjustified attempt by a state in which 12% of the national trade in distilled spirits is conducted to use its economic power to coerce distillers, wholesalers and importers into accommodating the state with prices which bear little relation to those that would obtain if New York market conditions were the determinant. But New York market conditions are ignored

while New York prices are based upon the costs, profits, labor conditions, taste preferences and governmental regulations which prevail in other states. It is submitted that it is precisely this type of legislation—grievously burdensome on commerce in other states without being of any value in protecting the public from the social problems connected with alcoholic beverage traffic—which must fall under the test reaffirmed only last Term in *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 377 U. S. 324 (1964).

POINT IV

The provisions of the new act requiring distillers and wholesalers to offer New York purchasers a price no higher than the lowest price given elsewhere are not justified under the state's police power and are hence a violation of due process of law guaranteed by the Constitution of the United States.

A. Section 9 is not in Furtherance of a Valid Police Power Objective.

The Fourteenth Amendment to the Constitution of the United States prohibits the several states from depriving any person "of life, liberty, or property, without due process of law."

It is well recognized that the constitutional prohibition against deprivation of one's property without due process of law is absolute unless property interests are affected as a result of a valid exercise of the state's inherent police power. The police power gives the state the right to impair the free enjoyment of one's property only if necessary to provide for the health, safety and general welfare of the people.

While the legislative right to pass enactments designed to advance the health, safety and welfare of the people is necessarily a broad power, it is not without limitation, for the Fourteenth Amendment to the federal constitution stands as a guardian of individual rights when state legislation affecting these rights does not comport with police power standards.

The distilled spirits industry in New York is basically private in nature. It is not regulated as a public utility. While admittedly subject to the sanctions of the Alcoholic Beverage Control Law, which attempt to prevent well recognized social harms that may result from undue consumption, the industry is none the less protected by basic constitutional guarantees. So long as the State allows alcoholic beverages to be sold within New York, it cannot deny members of the industry their rights under these constitutional guarantees. See *Russo* v. *Morgan,* 174 Misc. 1013, 1015, 21 N. Y. S.2d 637, 640 (Sup. Ct. 1940). See also *People* v. *Luhrs,* 195 N. Y. 377 (1908); *Wynehamer* v. *People of New York,* 13 N. Y. 378 (1856); *Clement* v. *Two Barrels of Whiskey,* 136 App. Div. 291, 120 N. Y. Supp. 1044 (4th Dep't 1910); *Schwegmann Bros.* v. *Louisiana Bd. of Alcoholic Beverage Control,* 216 La. 148, 43 So. 2d 248 (1949); cf. *Levine* v. *O'Connell,* 275 App. Div. 217, 88 N. Y. S.2d 672 (1st Dep't 1949), *aff'd,* 300 N. Y. 658 (1950).

Appellees throughout the course of this action have taken a position which leads to the belief that they consider members of the alcoholic beverage industry bereft of the right to challenge state alcoholic legislation on virtually any constitutional ground. Members of this industry, appellees would submit, are for some unexplained reason not entitled to rely upon the constitutional guarantee of due

process available to those in other businesses. Appellees would have judicial inquiry cease once it had been ascertained that a state legislature passed the bill in the belief it was acting for the benefit of society. State legislatures rarely profess to enact legislation for any other purpose.

The acceptance of this position, of course, would mean that there can be no meaningful judicial review of any state alcoholic beverage legislation. It does not follow that because a state can constitutionally prohibit the sale of alcoholic beverages, it is free to impose the most onerous and unreasonable burdens upon industry members if it permits the sale of these beverages. See *Hornsby* v. *Allen*, 330 F. 2d 55 (5th Cir. 1964); *Goesaert* v. *Cleary*, 335 U. S. 464 (1948) (by implication).

Although this Court in recent years has refused to strike state statutes on substantive due process grounds, language in cases brought before it has indicated that the Court will apply the constitutional guarantee when as here there is no police power purpose being served. See *Goldblatt* v. *Town of Hempstead*, 369 U. S. 590, 594-95 (1962); *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 488 (1955); *Cities Service Co.* v. *Peerless Co.*, 340 U. S. 179, 186 (1950); *Nebbia* v. *New York*, 291 U. S. 502, 525 (1934).

An examination of judicial precedent upholding maximum price legislation on due process grounds shows that these cases divide into two categories. First there are those which deal with essential goods, *e.g.*, *Nebbia* v. *New York*, 291 U. S. 502 (1934) (milk pricing). Then there are cases which uphold maximum price limitations because of industry abuses which can only be corrected by this device. See *Gold* v. *Di Carlo*, 235 F. Supp. 817 (S. D. N. Y. 1964), *aff'd*, 380 U. S. 520 (1965). Scrutiny of Section 9 and the

professed legislative intent underlying its passage readily reveals that it fits into neither of these categories. As Chief Judge Desmond noted in his dissenting opinion:

> The only "evil" against which this legislation is directed is found, apparently, in the fact that some people somewhere in this country under other unknown and uninvestigated conditions buy liquor more cheaply than we do. If this be good law, similar statutes may be passed as to any sale-licensed commodity. 16 N. Y. 2d at 63.

The police power rationale for the entirety of the New York ABC Law is contained in Section 2 of that law, which provides:

> It is hereby declared as a policy of the state that it is necessary to regulate and control the manufacture, sale and distribution within the state of alcoholic beverages *for the purpose of fostering and promoting temperance in their consumption* and respect for and obedience to the law. (Emphasis added.)

Section 8 of Ch. 531, as noted, states that the particular purpose for the enactment of Section 9 was to "forestall possible monopolistic and anti-competitive practices."

Nothing in the legislative history of the new act nor in the Moreland Commission reports evidences that Section 9 was enacted to thwart any other evil. Thus, to hold Section 9 constitutional, this Court must be convinced that the no higher than the lowest price provisions—maximum price limitations—were in fact enacted for the purpose of and reasonably serve either to promote temperance or to "forestall possible monopolistic and anti-competitive practices."

Looking first to the economic evil that allegedly will result if maximum price provisions are not enacted, uncontradicted affidavits contained in the record demonstrate the

belief of a professional economist (R. 237-97) as well as members of the industry that vigorous competition has prevailed in the past and should in all likelihood continue for the foreseeable future in the distilled spirits industry at the manufacturing, wholesaling and importing levels. Indeed, the now repealed mandatory resale price maintenance section was enacted in response to the vigorous industry competition in New York which the Legislature felt was resulting in prices too low for the public good. See ABC Law, Section 101-c-1. Appellees have offered nothing to show that competition within the industry would be any less vital if a free market prevailed in New York today. A 1963 report on industry advertising regulation published by the Joint Committee of the States to Study Alcoholic Beverage Laws, a body composed of state liquor control board members, confirms the statements of these affidavits by asserting that members of the industry "are in a highly competitive enterprise." Joint Committee of the States to Study Alcoholic Beverage Laws, *Uniform Standards for Advertising of Alcoholic Beverages in Newspapers and Magazines,* 30 (1963). This view is further supported in Alderfer and Michl, *Economics of American Industry,* 612 (3d ed. 1957).

It is axiomatic that monopolistic and anti-competitive practices cannot be pursued where competition is vigorous, for by definition it is the very purpose of these practices to restrict competition and thus among other things deprive the purchaser of the goods in question, the fair price that results from free market action and to secure an artificially high price for the benefit of the producers. See *1955 Att'y Gen. Nat'l Comm. Antitrust Rep.,* 324.

Of course an obvious flaw in the stated purpose underlying Section 9 is the failure to define "unjustifiably higher" prices. The Legislature seems to attempt to transform a marketing reality—an actual differential between consumer price levels in New York and certain atypical markets—into an economic concept—price differentials are to be suppressed because they are warnings of possible attempts in the future by distillers, wholesalers and importers to engage in monopolistic and anti-competitive practices. But in terms of antitrust economics an "unjustifiably higher" price can result only when "a few persons acting together can control the prices of a commodity . . ." *American Tobacco Co.* v. *United States,* 328 U. S. 781, 811 (1946). This attempt to use mere retail price differentials between disparate markets as a basis upon which to predicate the potential occurrence of anti-competitive practices at the distiller and wholesaler levels emphasizes the total lack of legislative inquiry into the capacity of these segments of the industry to engage in such practices. The conflict of this concept with federal antitrust policy has been documented at pp. 44-46, *supra.*

Competitive conditions and the cost of doing business obviously may vary widely between markets, and a producer or wholesaler of goods must be flexible enough to respond to these conditions. This is true for any product, whether it be liquor or candy, but it is especially true of liquor since the industry is subject to a wide variety of state regulation which in itself tends to affect competitive conditions in particular states. For example, lower net prices from distillers to wholesalers and from wholesalers to retailers exist in certain states because temporary promotional and advertising allowances are granted to pur-

chasers by the sellers. In New York this practice is prohibited by Section 101-b-2(b) of the ABC Law. Because advertising allowances are forbidden in New York, distillers must bear the entire burden of this expense. An advertising allowance, an expenditure designed to stimulate sales at the expense of one's competitor, is impliedly looked upon by the New York Legislature as an anti-competitive device from which New York purchasers must be protected. In effect Section 9 of Ch. 531, requiring such allowances and discounts to be a factor in computing the lowest price given elsewhere, stipulates that distillers and New York wholesalers must indirectly give these allowances to purchasers in New York when they are forbidden by law to grant them directly because they are not considered beneficial to the promotion of temperance. The result will be that the distiller will be forced to deduct advertising allowances given in other states from his New York prices, while continuing to bear the entire expense of all New York advertising. See ABC Law, Section 101-b-1.

The Legislature has set up the standard of possible monopoly, an evil theoretically existing in any industry. After establishing the evil from whole cloth, it proclaims monopoly can only be averted by demanding the lowest net prices charged elsewhere. In other words retail market price differentials are *per se* indications of an incipient monopolistic condition at the production and primary distribution levels. This view finds no support in the field of antitrust economics.

The only other reasonable basis for legislative action affecting the price at which manufacturers and wholesalers of branded distilled spirits may sell in New York is the promotion of temperance. To reiterate, in order to avoid viola-

tion of the Fourteenth Amendment to the Constitution of the United States, the New York Legislature must have detected an evil resulting from the manufacture, sale or use of alcoholic beverages which demands that maximum price limitations be placed upon the sale of these beverages by distillers and wholesalers. But, as the dissent below cogently illustrates, these maximum price provisions bear no reasonable relationship to the protection of the health, morals or welfare of the community.

The command of Section 2 of the ABC Law is a positive one; legislation regulating the manufacture, sale or use of intoxicating liquors is a proper exercise of the police power only if it *promotes* temperance. Thus, the finding of the Moreland Act Commission in support of the repeal of mandatory resale price maintenance that price has little or no relation to temperance is not grounds for a determination that placing maximum prices upon sales of branded liquor to New York wholesalers and retailers will somehow *promote* temperance. That the legislative enactment may have no deleterious effect upon temperance is immaterial. To accord with Section 2 of the ABC Law, the statute must *affirmatively promote temperance.*

This result is in accordance with the position the distilled spirits industry occupies in the State of New York. As noted it is, first of all, a private industry, unlike public utilities, and is operated in the same general manner as other private industries. However, pursuant to Section 2 of the ABC Law, it is subject in New York to intensive regulation "Because of the many evils attendant upon traffic in liquor. . . ." *Calvary Presbyterian Church* v. *State Liquor Authority,* 245 App. Div. 176, 178, 281 N.Y. Supp. 81, 85 (4th Dep't 1935), *aff'd,* 270 N. Y. 497 (1936). Hereto-

fore, in New York, any challenge to the constitutionality of enactments affecting intoxicating liquors has been decided by the test of whether the challenged enactment met the legislative purpose of promoting temperance announced in Section 2. See *People* v. *Ryan,* 274 N. Y. 149, 152 (1937); *People* v. *Tourists International, S.A.,* 40 Misc. 2d 99, 105, 242 N. Y. S. 2d 756, 762 (Sup. Ct. 1963).

It is patent that fixing maximum price limits upon which manufacturers and wholesalers of branded distilled spirits may sell in New York in order to assure purchasers the lowest possible price for these liquors does not promote temperance. As it was put in Chief Judge Desmond's dissenting opinion below, "To promote temperance by making intoxicants cheaper is like trying to minimize the dangers of excessive smoking by abolishing cigarette taxes" (R. 352).

Appellants, in view of the Moreland Act Commission's determination that the propensity to drink is unrelated to the price at which liquor is sold, cannot see how an argument can be made that a statute avowedly designed to accord the lowest possible price to New York liquor consumers can in fact affirmatively serve to ensure that these consumers are temperate in their use of these beverages. Can it be argued that the interests of moderation in alcoholic beverage consumption will be affirmatively advanced if consumers obtain the lowest possible prices for nationally branded spirits but not for private label brands and wines? Will alcoholism, public drunkenness and sales to minors be reduced if liquor is made more accessible through lower prices? These questions are answered in the asking.

Appellees have claimed that this particular legislation benefits the general welfare solely because it will immediately result in lower prices to consumers in New York.

Aside from the fact that this is neither the purpose nor, so long as the New York fair trade law applies to the alcoholic beverage industry, a probable result of Section 9, it is submitted that this argument can be applied to legislation dealing with any commodity. If appellees' views as to the scope of the power to legislate on behalf of the "general welfare" are accepted, then the due process clause can be no barrier to legislation similar in construction to Section 9 fixing the maximum prices of automobiles, television sets and the like. Appellants offer that this type of legislation is yet to be deemed a proper exercise of a state's police power.

B. Section 9 is Arbitrary and Unreasonable.

Assuming arguendo that these maximum pricing provisions function to promote the health, safety and welfare of the general populace, they still violate the Fourteenth Amendment to the Constitution. This is so because Section 9 imposes unreasonable, arbitrary and capricious burdens upon appellants which do not serve to remedy the purported evil. See *Goldblatt* v. *Town of Hempstead,* 369 U. S. 590 (1962); *Nebbia* v. *New York,* 291 U. S. 502 (1934).

Bearing in mind that this legislation is justified in Section 8 as special antitrust regulation directed to possible "monopolistic and anti-competitive practices," it becomes clear that this maximum price measure regulating the distilled spirits industry is unreasonable. This becomes apparent merely by juxtaposing Section 9 of Ch. 531, whose rationale as we have seen is the same as other antitrust acts, with the terms of these acts. None of them, state or federal, in order to protect vigorous competition provides that sales can be made only if the sellers agree to charge

maximum prices based upon the lowest price given elsewhere in the United States. Direct interference with free market pricing structures is inimical to the rationale of these acts which is a belief in free and unfettered competition.

The legislation is arbitrary, capricious and unreasonable in several other respects. The law is penal in nature, see section 101-b-3(j), and one signing the affirmations that the price filed for a particular brand in the monthly price schedule is no higher than the lowest price offered anywhere else in the United States does so at his peril.

The problems of determining the price at which a distiller's brands are sold by wholesalers to retailers are particularly grave. Section 101-b-3(f) requires the distiller to affirm that the price at which New York wholesalers who are "related persons" will sell to retailers in the next succeeding month is no higher than the lowest price at which wholesalers doing a "substantial" business in the distiller's brands in other states sold those brands during the immediately preceding month.

Most of the wholesalers to whose prices the distillers must attest are independent businessmen and are under no legal obligation to give information as to their prices or the quantity of the business they do in a particular distillers' brands to the distillers. Thus, for example, a distiller may sell his brand to an independent Chicago wholesaler, who does a substantial volume of business in the distiller's brands. The Chicago wholesaler, permitted by law, may charge a net price to retailers that includes various discounts and promotional allowances. These discounts and allowances are not published in any trade journal. But before a New York wholesaler who is deemed to be a "related

person" can sell that brand to New York retailers, the distiller must have verified an affirmation that the price schedule filed by the New York wholesaler lists a price to New York retailers that is no higher than the lowest price at which the Chicago wholesaler sold that brand during the preceding month.

The record shows that independent wholesalers in other states, under no legal compulsion to do so, may not furnish such information to the distillers (R. 300, 303, 305). Section 101-b-3(f) will prevent a large group of New York wholesalers from selling branded distilled spirits to retailers in New York; it will require distillers to threaten to refuse to sell to wholesalers elsewhere in the United States unless such information is delivered, a type of coercion that would appear to be objectionable under federal antitrust laws. See *F. T. C.* v. *Beech-Nut Packing Co.*, 257 U. S. 441 (1922); *George W. Warner & Co.* v. *Black & Decker Mfg. Co.*, 277 F.2d 787 (2d Cir. 1960); *A. C. Becken Co.* v. *Gemex Corp.*, 272 F.2d 1 (7th Cir. 1959).

The majority opinion below fails to evince concern over this situation. Nor does it even acknowledge that distillers and New York "related person" wholesalers—both in their own way dependent upon obtaining pricing information from wholesalers throughout the country—have no legal means by which they can obtain the information needed to satisfy the command of Section 9.

Section 9 is also unreasonable because it exposes distillers to extortionate practices at the hands of "related person" wholesalers in other states. Once again, taking the example of the Chicago wholesaler who does a "substantial" part of his business in the brands of one distiller, assume that out of vindictiveness or in an attempt to